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IN THE

Supreme Court of the United States

NO. 1350

EDWARD E. MATOSKY,

Petitioner,

VS.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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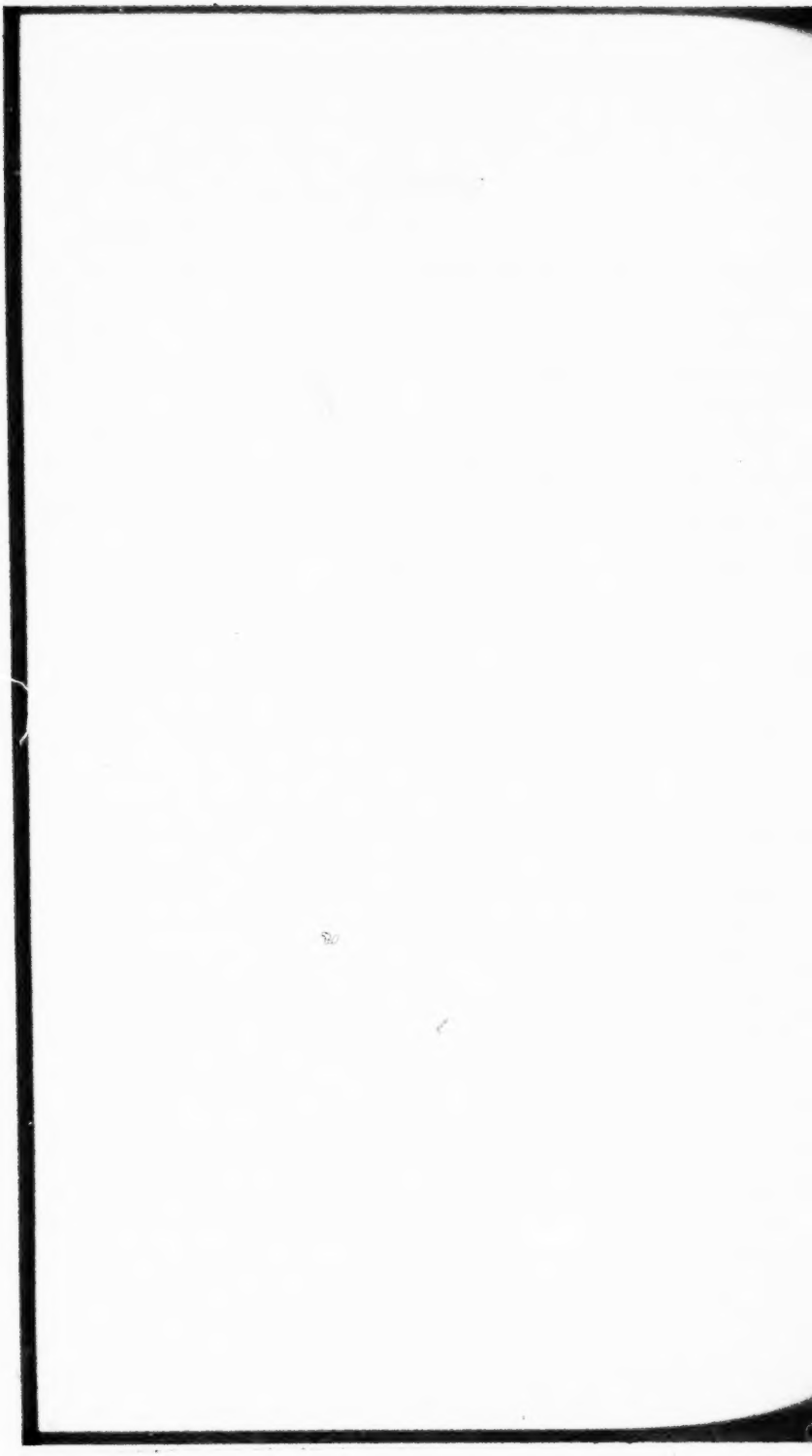

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EDWARD E. MATOSKY,

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UNITED STATES OF AMERICA,

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

To the Honorable Chief Justice and Associate Justices of the Supreme Court of the United States:

The petitioner, Edward E. Matosky, prays for a writ of certiorari to issue to review the judgment of the United States Court of Appeals for the Seventh Circuit.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Seventh Circuit, not yet reported, affirming the judgment of conviction below is attached as Appendix "A".

STATEMENT OF JURISDICTION

The petitioner, Edward E. Matosky, appealed his conviction in the United States District Court for the Northern District of Illinois to the United States Court of Appeals for the Seventh Circuit. On February 2, 1970, the United States Court of Appeals for the Seventh Circuit affirmed the judgment of conviction. A petition for rehearing was thereafter filed and on February 26, 1970, the United States Court of Appeals for the Seventh Circuit denied said petition. (Appendix "B")

On March 4, 1970 the mandate of the United States Court of Appeals for the Seventh Circuit was stayed for a period of 30 days in accordance with the provisions of Rule 41(b) of the Rules of that Court.

The jurisdiction of this Court is invoked under the provisions of 28 U.S.C.A., Sec. 1254 (1).

QUESTIONS PRESENTED

1. Whether the nature of "willfulness" involved in failing to file a federal income tax return is the same under the misdemeanor statute, Title 26, U.S.C. Sec. 7203, as it is under the felony statute Title 26 U.S.C. Sec. 7201.

2. Whether reasons for failing to file a federal income tax return are irrelevant in a misdemeanor prosecution, under Title 26 U.S.C. Sec. 7203.

STATUTES INVOLVED

Title 26, 7203, U.S.C.A. states:

> "Any person required under this title to pay any estimated tax or tax, or required by this title or by regulations made under authority thereof to make a return (other than a return required under authority of Section 6015 or Section 6016), keep any records, or supply any information, who willfully fails

to pay such estimated tax or tax, make such return, keep such records, or supply such information, at the time or times required by law or regulations, shall, in addition to other penalties provided by law, be guilty of a misdemeanor and, "* * * shall be punished".

Title 26, Section 7201, U.S.C.A. states:

"Any person who willfully attempts in any manner to evade or defeat any tax imposed by this title or the payment thereof, shall in addition to other penalties provided by law, be guilty of a felony and "* * * shall be punished".

Title 26, Section 6651, U.S.C.A. states:

"(a) Addition to the Tax — In case of failure to file any return required under authority of subchapter A of chapter 61 (other than part II thereof) of subchapter A of chapter 51 (relating to distilled spirits, wines, and beer), or of subchapter A of chapter 52 (relating to tobacco, cigars, cigarettes, and cigarette papers and tubes), or of subchapter A of chapter 53 (relating to machine guns and certain other firearms), on the date prescribed therefor (determined with regard to any extension of time for filing), unless it is shown that such failure is due to reasonable cause and not due to willful neglect, there shall be added to the amount required to be shown as tax on such return 5 percent of the amount of such tax if the failure is for not more than 1 month, with an additional 5 percent for each additional month or fraction thereof during which such failure continues, not exceeding 25 percent in the aggregate.

(b) Penalty Imposed on Net Amount Due — For purposes of subsection (a), the amount of tax required to be shown on the return shall be reduced by the amount of any part of the tax which is paid on or before the date prescribed for payment of the tax and by the amount of any credit against the tax which may be claimed upon the return.

(c) Exception for Declarations of Estimated Tax. —This section shall not apply to any failure to file a declaration of estimated tax required by section 6015 or section 6016."

STATEMENT OF THE CASE

The defendant was convicted on all counts of a three count information charging him with willful failure to file his federal income tax returns for the years 1962, 1963, 1964 in violation of Section 7203 of the 1954 Internal Revenue Code.

It was stipulated that defendant was required to file income tax returns for the years involved, knew of this requirement, but did not file returns for 1962 and 1963, and did not file a return for 1964 until April 17, 1967.

The evidence further disclosed that the defendant came to Chicago in 1960 when he was about 19 years old. Prior to this time he had lived in New York City and had filed income tax returns as required by law. He came to Chicago to avoid prosecution for a commercial fraud committed in Suffolk County, New York, arising out of improprieties in a home improvement loan. He had been indicted and was a fugitive from the State of New York until approximately August, 1965, when he was arrested

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by agents of the Federal Bureau of Investigation on a fugitive warrant.

Upon coming to Chicago, the defendant assumed an alias and was employed under that name. After his arrest, he informed his employer that he had assumed the alias to avoid apprehension by New York State and Federal authorities. Subsequently he told his employer that he had not filed federal income tax returns since coming to Chicago. He said that he knew the returns should have been filed but that he feared filing the returns under his true name would cause his apprehension. He also feared that if he filed the returns under the alias, his identity would be discovered because he had not taken out a social security number under the alias.

Upon the advice of his employer, the defendant met with a tax attorney recommended by the employer. That meeting took place in *February, 1966*. The defendant told the attorney why he did not file the returns and asked the attorney to file the returns as soon as possible.

A Special Agent of the Intelligence Division of the Internal Revenue Service was assigned to the case on November *1966* and contacted the defendant in *February* 1967. At no time during the course of the investigation, did the Special Agent speak with agents of the Federal Bureau of Investigation concerning this case and prior to February of 1967, he was not in contact with any other governmental agency with regard to the delinquent tax returns of the defendant.

Between the time of defendant's initial visit to the attorney in February of 1966 and the entry of the special agent into the case, the defendant asked the attorney many times if the returns for the years 1962 through 1964 were filed. After the Special Agent commenced his

investigation, the defendant persisted in his inquiries as to whether or not the returns had been filed. The attorney admitted during the trial that he was largely responsible for the delay in filing the returns after the defendant had sought his assistance. He testified that the delay in filing returns was caused by the fact that he did not have enough time to devote to the case and the defendant having no funds to pay taxes and attorneys' fees. The attorney still had not filed the returns for 1962 and 1963 at the time of trial in November of 1968.

The only issue for jury determination at trial was whether defendant's failure to file the returns for the relevant years was willful. Accordingly, instructions as to the meaning of willfulness were crucial.

The instructions given by the trial court on the "willfulness" element of the offense advised the jury, inter alia, that "willful" as used in Section 7203 means simply voluntary, purposeful, deliberate and intentional conduct as distinguished from accidental, inadvertent, or negligent conduct, and that the only bad purpose or bad motive necessary for the government to prove is a deliberate intention not to file returns which the defendant knew ought to have been filed.

The defendant's proffered instructions, which were refused, modified the phrase bad purpose by including language which has been approved in several Circuit Courts of Appeals. See *Yarbourgh* v. *United States,* 230 F. 2d 56 (4th Cir. 1961), *United States* v. *Gorman,* 393 F. 2d 209 (7th Cir. 1968), *United States* v. *Goldman,* 352 F. 2d 263 (3rd Cir. 1965). That modifying language included as part of the bad purpose a motive *"to prevent the government from getting what it lawfully requires"* or *"that the government would not know the extent of the liability".*

In addition the defendant tendered instructions to the effect that in determining whether his failure to file was "willful" the jury should consider the testimony that he did not file the returns because he feared filing would disclose his identity which would result in his prosecution by the New York authorities. The proffered instructions also stated the jury could consider whether such reason was based on actual belief and held in good faith as part of the question of "willfulness". The Court below held that the reason the defendant failed to file was irrelevant.

REASONS FOR GRANTING WRIT

Petitioner respectfully submits that the decision of the Court below conflicts in principle with decisions of the Circuit Court of Appeals for the Third and Fifth Circuits. The Third and Fifth Circuits enunciate the proposition that the nature of "willfulness" is the same under both sections 7203 and 7201. *Haner* v. *United States,* 315 F. 2d 792 (5th Cir. 1963) and *United States* v. *Vitiello,* 363 F. 2d, 240 (3rd Cir. 1966). The contrary proposition is asserted in *United States* v. *Schipani,* 362 F. 2d 825 (2nd Cir. 1966) and *United States* v. *Fahey,* 411 F. 2d 1213 (9th Cir. 1969).

Moreover, two landmark cases decided by this Court, *Sansone* v. *United States,* 380 U.S. 343, 350 and *Spies* v. *United States,* 317, U.S. 492, 496 (1943), in the area of criminal tax law are seriously misinterpreted by the Court below.

The correct interpretation of decisions of this Court in *Spies* v. *United States, supra* and *Sansone* v. *United*

States, supra is as stated in *United States* v. *Vitiello,* 363 F. 2d 240 (3rd Cir. 1966):

> "It is true that * * *, *Spies* makes a distinction between the criminality of the misdemeanor and the criminality of the felony. (Citation omitted.) *However, this distinction is found in the additional misconduct which is essential to the violation of the felony statute, examples of which are given* in *Spies* at page 499 of 317 U.S. at page 368 of 63 S. Ct., *and not in the quality of willfulness which characterizes the wrongdoing.* Thus, in *Sansone* v. *United States,* 1965, 380 U.S. 343, 85 S. Ct. 1004, 13 L. Ed. 2d 882, the defendant indicted and tried for the section 7201 felony, claimed that he was entitled to a charge on the misdemeanor under the lesser included offense doctrine. After finding that the only issue at trial was whether the defendant's acts charged as constituting attempted tax evasion were "willful", the court held that the defendant was not entitled to a lesser offense charge because, as applied to the given fact situation, 'willful' in the two sections 'covered precisely the same ground'. (Emphasis supplied.) *United States* v. *Vitiello,* 363 F. 2d 240, 243 (3rd Cir. 1966).

This court should not permit a proposition of law to stand which states that reasons for failing to file are irrelevant upon a showing that a defendant knew he was required to file a return and that he deliberately failed to file a return to stand. Such a holding completely contravenes major principles of the *Spies* and *Sansone* cases and ignores the necessity for the existence of bad purpose and evil motive.

Lack of bad purpose is not limited to situations involving accident, mistake, negligence or misconception. The civil penalities for failure to file a return, Title 26 U.S.C. Section 6651, provide ample retribution against delinquent taxpayers, whose untimeliness is without bad purpose. Under the criteria, as set forth by the opinion of the Court below, a procrastinating taxpayer who knowingly missed the April 15 deadline for filing individual tax returns and whose failure to file was not inadvertent, negligent, mistaken or based upon a misconception would be guilty of a violation of Section 7203. Also a person who decided not to file a tax return to claim a tax refund would be similarly guilty. How in either of these situations could a crime be committed if there was no intention to prevent the Government from knowing the extent of the tax liability or a purpose to prevent the Government from getting that which it lawfully requires? It is therefore respectfully submitted that reasons for not filing are extremely relevant.

CONCLUSION

For the reasons stated it is respectfully prayed that a writ of certiorari issue from this Court to review the judgment of the United States Court of Appeals for the Seventh Circuit in this case.

Respectfully submitted,

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APPENDIX "A"

FEBRUARY 2, 1970

Before CASTLE, *Chief Judge,* HASTINGS, *Senior Circuit Judge,* and KILEY, *Circuit Judge.*

CASTLE, *Chief Judge.* Defendant-appellant, Edward E. Matosky, prosecutes this appeal from the judgment of conviction and sentence entered following his trial before a jury on a three-count indictment charging failure to file timely income tax returns for the years 1962, 1963, and 1964, in violation of 26 U.S.C. §7203.[1] The defendant predicates the existence of error requiring a reversal on the district court's rejection of instructions tendered by the defendant and the giving of the instructions it did.

There was evidence that the defendant had fled from New York to Chicago to avoid a state prosecution and that he did not file returns for 1962 and 1963, and did not file the return due for 1964 until April 17, 1967, in order to avoid detection of his whereabouts and apprehension. It was stipulated, however, that defendant was required to file income tax returns for the years involved, knew of this requirement, but did not file returns for 1962 and 1963, and did not file a return for 1964 until April 17, 1967.

[1] 26 U.S.C. §7203 provides: "Any person required under this title to pay any estimated tax or tax, or required by this title or by regulations made under authority thereof to make a return (other than a return required under authority of section 6015 or section 6016), keep any records, or supply any information, who willfully fails to pay such estimated tax or tax, make such return, keep such records, or supply such information, at the time or times required by law or regulations, shall, in addition to other penalties provided by law, be guilty of a misdemeanor and, upon conviction thereof, shall be fined not more than $10,000, or imprisoned not more than 1 year, or both, together with the costs of prosecution."

It appears that the only issue for jury determination resulting from the trial was whether defendant's failure to file the returns for the relevant years was willful.

The defendant contends that the jury should have been instructed that the failure to file must have a tax associated motive to be "willfull" within the meaning of §7203, and that the evidence that defendant's failure to file was due to his fears that it would lead to his discovery and apprehension should be considered in determining whether the "willfulness" element of the offense had been established.

The instructions given by the trial court on the "willfulness" element of the offense advised the jury, inter alia, that "willful" as used in §7203 means simply voluntary, purposeful, deliberate and intentional conduct as distinguished from accidental, inadvertent, or negligent conduct, and that the only bad purpose or bad motive necessary for the government to prove is a deliberate intention not to file returns which the defendant knew ought to have been filed.

The defendant's proffered instructions, which were refused, incorporated as an essential element of "willfulness' the existence of a tax associated motive — a failure to file "so that the government would not know the extent of liability" and "purpose to prevent the government from getting that which it lawfully requires" and would have advised the jury that in determining whether defendant's failure to file was "willful" it should consider the testimony that he did not file the returns because he feared they would disclose his identity and he would be prosecuted by the New York authorities and whether such reason was based on actual belief and held in good faith.

We perceive no error in the instruction as given by the trial court or in its rejection of the instructions tendered by the defendant.

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Defendant's argument that the test of "willfulness" is the same under §7203, as it is under §7201,[2] has been rejected by the Supreme Court in *Sansone* v. *United States,* 380 U.S. 343, 351 (1965). There the Court held that a mere willful omission is sufficient to commit the misdemeanor proscribed by §7203, while a willful commission is required to commit the felony proscribed by §7201.

A succinct discussion of the issue presented in the instant case is found in *United States* v. *Schipani,* 362 F. 2d 825, 831 (2d Cir. 1966), cert. den. 385 U.S. 943, where the Court stated:

> " 'Willfully' under §7203 calls only for proof that the taxpayer failed to file his tax return intentionally and knowingly and not through accident or mistake or other innocent cause. 'Willfully' under §7201 calls for proof that the taxpayer failed to file a tax return with the specific intention of evading or defeating payment of the tax. The context of the respective statutes makes this perfectly clear, and they have been so interpreted and construed by the Supreme Court. *Sansone* v. *United States,* 380 U.S. 343, 85 S. Ct. 1004, 13 L. Ed. 2d 882 (1965); *Spies* v. *United States,* [317 U.S. 492 (1943)]."

See also *United States* v. *Fahey,* 411 F. 2d 1213, 1214 (9th Cir. 1969), where the Court stated:

> ". . . Unlike some other circuits,[3] we suggest that Congress intended to draw a distinction between an intent to *defraud* (which intent must be willful), and a willful intent to fail to *file,* which may or may not involve an intent to defraud. For example, one might

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[2] 26 U.S.C. §7201 provides: "Any person who willfully attempts in any manner to evade or defeat any tax imposed by this title or the payment thereof shall, in addition to other penalties provided by law, be guilty of a felony and, upon conviction thereof, shall be fined not more than $10,000, or imprisoned not more than 5 years or both, together with the costs of prosecution."

[3] See Haner v. United States, 315 F. 2d 792 (5th Cir. 1963); United States v. Vitiello, 363 F. 2d 240 (3d Cir. 1966).

honestly plan and intend to pay the tax revenues due his Government at some future time subsequent to the required filing date, and hence have no intent to defraud. If one intentionally fails to file a return (or keep records, or supply information) at the times required by law, with full knowledge he was required to do so (whether or not he can pay), would it not be an intentional act — not to defraud, but to file the required return? The Supreme Court has held it to be. *Sansone* v. *United States,* 380 U.S. 343, 85 S. Ct. 1004, 13 L. Ed. 2d 882 (1965).

'This misdemeanor requires only willfulness and the omission of the required act. * * *

* * * * * * *

'[T]he intent to report the income and pay the tax sometime in the future does not vitiate the willfulness required by §7203 * * * Id. at 354, 85 S. Ct. at 1011.' "

We believe *Schipani* and *Fahey* incorporate a correct interpretation of the statute and are in harmony with the Supreme Court's statement in *Spies* v. *United States,* 317 U.S. 492, 496 (1943), that,

". . . a duty may exist even when there is no tax liability to serve as a base for application of a percentage delinquency penalty; the default may relate to matters not identifiable with tax for a particular period; and the offense may be more grievous than a case for civil penalty. Hence the willful failure to make a return, keep records, or supply information when required, is made a misdemeanor, without regard to existence of a tax liability. . . . Punctuality is important to the fiscal system, and these are sanctions to assure punctual as well as faithful performance of these duties."

Thus, contrary to defendant's contention, the defendant's motive need not be restricted to an intent to defraud the Government in order for there to be a viola-

tion of §7203. Rather, the Government has proven its case when it has established beyond a reasonable doubt: that the defendant was required to file a return; that he knew that he was so required; and that he willfully or purposefully, as distinguished from inadvertently, negligently, or mistakenly,[4] failed to file such a return. His reasons for failing to so file are irrelevant under §7203, so long as the above facts are shown. The only good faith defense to a charge of failure to file a required return is one where the defendant alleges "a bona fide misunderstanding as to his liability for the tax, as to his duty to make a return, or as to the adequacy of the records he maintained. . . ." *United States* v. *Murdock*, 290 U.S. 389, 396 (1933). Since no such defense was raised by defendant in the instant case, the requested instruction was properly refused.

For the foregoing reasons, the judgment of conviction is affirmed.

AFFIRMED.

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Teste:

.....
Clerk of the United States Court of Appeals for the Seventh Circuit.

[4] See Haner v. United States, 315 F. 2d 792, 794 (5th Cir. 1963).

APPENDIX "B"

UNITED STATES COURT OF APPEALS

For the Seventh Circuit

Chicago, Illinois 60604

Thursday, February 26, 1970

Before

Hon. LATHAM CASTLE, Chief Judge

Hon. JOHN S. HASTINGS, Sr., Circuit Judge

Hon. Roger J. Kiley, Circuit Judge

UNITED STATES OF AMERICA, *Plaintiff-Appellee,* vs. No. 17435 EDWARD E. MATOSKY, *Defendant-Appellant.*	Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.

IT IS ORDERED by the Court that the petition for rehearing filed in the above-entitled case be, and the same is hereby denied.